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82-829

No. 82 -

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1982

In Re: Fine Paper Antitrust Litigation
MDL 323

STATE OF ALASKA, et al,

Petitioners,

v.

BOISE CASCADE, et al,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In ruling on the transfer of Petitioners' cases under 28 U.S.C. § 1404(a), were the courts below justified, in light of the mandate of Hoffman v. Blaski, 363 U.S. 335 (1960), in applying the prerequisite language of the statute - which limits the transfer of cases to those districts where the actions "might have been brought" - by considering the situation that existed at the time of transfer, rather than at the time the actions were brought.

2. Did the scheduling of discovery and trial in these multidistrict antitrust cases, pursuant to which Petitioners were, inter alia, 1) allowed only 12.5 months within which to review 1.8 million documents and depose 270 people, 2) required to submit a pretrial

memorandum one week after the discovery cutoff date, with less than half of the deposition transcripts available, 3) required to commence an originally scheduled trial two weeks after the discovery cutoff date, with the deposition transcripts still unavailable, and 4) required to commence a rescheduled trial on one weeks notice, reflect proper regard for the constituent elements of Rule 1, F. R. Civ. P., in light of the demonstrable need for additional time within which to adequately and effectively complete discovery and prepare for trial.

3. Under Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962), did the district court err in partially directing a verdict against Petitioners in light of evidence not susceptible to a non-conspiratorial

interpretation which demonstrated the very conspiracy alleged by Petitioners.

4. Did the district court err in excluding evidence of Arkansas purchases as a sanction for Arkansas having relied upon the procedural safeguards of Rule 33(c), F. R. Civ. P., in responding to certain interrogatories by producing responsive documents in lieu of completing thousands of forms submitted with the interrogatories.

5. In ruling on motions for class certification, did the district court err in applying the commonality requirements of Rule 23, F. R. Civ. P., by comparing one class with another class, rather than by comparing the claims of the class representative with the claims of the class.

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PARTIES TO THE PROCEEDING

The parties to the proceedings in the court of appeals were as follows:

Plaintiffs/Appellants:

State of Alaska
State of Arkansas
State of California
State of Colorado
State of Iowa
State of Missouri
State of Montana
State of Nebraska
State of Oregon
State of Washington

Defendants/Appellees:

Boise Cascade Corp.
Butler Paper Co.
Champion International Corp.
Crown Zellerbach Corp.
Great Northern Nekoosa Corp.
Hammermill Paper Co.
International Paper Co.
Kimberly-Clark Corp.
The Mead Corp.
Scott Paper Co.
Weyerhaeuser Co.

TABLE OF CONTENTS

	Page
Questions Presented For Review	i
1.	
2.	
3.	
4.	
Parties to the Proceeding	vii
Table of Contents	viii
Table of Authorities	ix
Opinions Below	1
Jurisdiction	2
Statutes and Rules Involved	3
Statement of the Case	6
Reasons for Granting the Writ	31
Conclusion	62
Appendix	

TABLE OF AUTHORITIES

CASES: Page

ACF Industries, Inc. v. E.E.O.C., 439 U.S. 1081 (1979) 49

Ackert v. Ausman, 198 F.Supp. 538 (S.D.N.Y. 1961) . . 35

Aetna Casualty & Surety Co. v. S/S Green Bay, 307 F.Supp. 72 (E.D. La. 1969) 47

In re Air Crash Disaster Near Chicago, Etc., 476 F.Supp. 445 (JPML 1979) 38, 39, 41

In re Air Disaster at John F. Kennedy Intern. Airport, 479 F.Supp. 1118 (E.D.N.Y. 1978). . 38

Alaska, et al. v. McGlynn, 449 U.S. 815 (1980) 29

American Society of Mechanical Engineers v. Hydrolevel Corp., ___ U.S. ___, 102 S.Ct. 1935, 72 L.Ed. 2d 330, 343 (1982) . . . 50

American Standard, Inc. v.Bendix Corp., 487 F.Supp. 254 (W.D. Mo. 1980) 33

In re Antibiotic Antitrust Actions, 333 F.Supp. 299 (S.D.N.Y. 1971) . . 38

Brotherhood of Locomotive Fire & Eng. v. Reading Company 279 F.Supp. 948 (E.D.Pa. 1968) 33, 35, 40

In re Career Academy Antitrust Litigation, 57 F.R.D. 569 (E.D. Wis. 1972) 39

Cessna Aircraft Company v. Brown, 348 F.2d 689 (10th Cir. 1965) . . . 40

City of Philadelphia v. Emhart Corporation, 317 F.Supp. 1320 (E.D. Pa. 1970) 39

Continental Ore Co., v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) 53

Daiflon, Inc. v. Allied Chemical Corp., 534 F.2d 221 (10th Cir. 1976) 56, 57

De La Fuente v. ICC, 451 F.Supp. 867 (N.D. Ill. 1978) . 34

In re Dept. of Energy Stripper Well Exemption, 472 F.Supp. 1282 (JPML 1979) 38

In re Disposable Diaper Patent Validity Litigation, 362 F.Supp. 567 (JPML 1973) 40

Eli Lilly and Company v. Generix Drug Sales, Inc., 460 F.2d 1096 (5th Cir. 1972) 48

In re Fine Paper Antitrust Litigation, 446 F.Supp. 759 (JPML 1978) 6

Foster Wheeler Corporation v. Aqua-Chem, Inc., 277 F.Supp. 382 (E.D. Pa. 1967) 40

Freehill v. Lewis, 355 F.2d 46 (4th Cir. 1966) 47, 48

Gaspar v. Kassm, 493 F.2d 964 (3rd Cir. 1974) 48

Greyhound Computer Corp. v. International Bus. Mach. Corp., 342 F.Supp. 1143 (D. Minn. 1972). . 38

Herbert v. Lando, 441 U.S. 153 (1979) 49

Hess Oil Virgin Islands Corp. v. UOP, Inc., 447 F.Supp. 381 (N.D. Okla. 1978) 33

Hoffman v. Blaski, 363 U.S. 335 (1960) 31

Hughes v. S.S. Santa Irene, 209 F.Supp. 440 (S.D.N.Y. 1962) . . 35

Intern. Patent Development v. Wyomont Partners, 489 F.Supp. 226 (D. Nev. 1980). . . 33

LaBuy v. Howes Leather Co., 352 U.S. 249 (1957) 49

Landis v. North American Company, 299 U.S. 248 (1936) 48

L.C. O'Neil Truck Pty. Limited v. Pacific Car & Foundary Co., 278 F.Supp. 839 (D. Ha. 1967) . . . 39

Levin v. Mississippi River Corporation, 289 F.Supp. 353 (S.D.N.Y. 1960) 40

Milsen Co. v. Southland Corp., 16 F.R.Serv. 2d (M.D. Ill. 1972) . 56

In re Nissan Motor Corp. Antitrust Litigation, 471 F.Supp. 754 (S.D. Fla. 1979) 38, 40

In re Oil Spill by "Amoco Cadiz" Off Coast of France, 491 F.Supp. 161 (N.D. Ill. 1979) . . 38

Olberding v. Illinois Central R. Co., 346 U.S. 338 (1953) 34

Oppenheimar Fund, Inc. v. Sanders, 437 U.S. 340 (1978) 59

Pan American Bank of Miami v. Gully, 220 F.Supp. 405 (W.D. Pa. 1963) . . 33

Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) 40

Parker-Hannifin Corp. v. Samuel Moore & Co., 436 F.Supp. 498 (N.D. Ohio 1977) 33

Polin v. Conductron Corporation, 340 F.Supp. 602 (E.D. Pa. 1972) . . 33

Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962) . . 54

Schlagenhauf v. Holder, 379 U.S. 104 (1964) 49

Schreiber v. Allis-Chalmers Corp., 448 F.Supp. 1079 (D. Kan. 1978) . . 33

Shutte v. Armco Steel Corporation, 431 F.2d 22 (3rd Cir. 1970) 32

Siemens Aktiengesellschaft v. Sonotone Corporation, 370 F.Supp. 970 (N.D. Ill. 1973) . 33

Silver v. Goodman, 234 F.Supp. 415 (D. Conn. 1964) 33

Sutherland Paper Co. v. Grant Paper Box Co., 183 F.2d 926 (3rd Cir. 1950) 47, 48

Technitrol, Inc. v. Digital Equipment Corporation, 62 F.R.D. 91 (N.D. Ill. 1972) 56

Thermo King Corporation v. White's Trucking Service, Inc., 292 F.2d 668 (5th Cir. 1961) . . . 48

Umbriac v. American Snacks, Inc., 388 F.Supp. 265 (E.D. Pa. 1975) . . 33

In re Viatron Computer Systems Corp. Litigation, 86 F.R.D. 431 (D. Mass. 1980) 41

Winston v. Prudential Lines, Inc., 415 F.2d 619 (2nd Cir. 1969). . . . 47

STATUTES:

15 U.S.C. § 15 . . . . . 6, 50

28 U.S.C. § 1254 3

28 U.S.C. § 1337 6

28 U.S.C. § 1404(a) . . . . . Passim

28 U.S.C. § 1407(a) . . . . . Passim

28 U.S.C. § 2101(c) 3

RULES:

Federal Rules of Appellate Procedure
Rule 35(b) 2

Federal Rules of Appellate Procedure
Rule 40(a) 2

Federal Rules of Civil Procedure
Rule 1 . . . . . Passim

Federal Rules of Civil Procedure
Rule 23 . . . . . 60, 61

Federal Rules of Civil Procedure
Rule 33(c) . . . . . Passim

Supreme Court Rule 19 2

Supreme Court Rule 20.4 3

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Annual Report of the Director of the Administrative Office of the United States' Courts (1980) 52

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, the States of Alaska, Arkansas, California, Colorado, Iowa, Missouri, Montana, Nebraska, Oregon and Washington (hereinafter "Petitioners"), respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on July 16, 1982.

OPINIONS BELOW

The opinion of the court of appeals is reported at 685 F.2d 810 (3d Cir. 1982) and at 1982-2 Trade Cases ¶ 64,843 (3d Cir. 1982). It is reproduced in the appendix annexed hereto at A1-A31.

The rulings and orders of the

district court relevant to this petition are unreported, but are reproduced in the appendix on file with the court of appeals. A true and correct copy of that appendix, certified as such, has been lodged directly with this Court by Petitioners in lieu of initiating the procedures set forth in Supreme Court Rule 19[1]

JURISDICTION

The court of appeals issued its opinion and entered judgment on July 16, 1982. A petition for rehearing was timely filed in accordance with F.R.A.P. 35(b) and 40(a),[2] and was

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1 The lodging of the appendix directly with this Court in lieu of initiating the Rule 19 procedure was recommended by the clerk in order to avoid inconveniencing the court of appeals with transmission of the record.

2 A40-A72.

denied on August 12, 1982.[3]

The jurisdiction of this Court is invoked under 28 U.S.C. § § 1254(1) and 2101(c), and Supreme Court Rule 20.4.

STATUTES AND RULES INVOLVED

The following statutes and rules are relevant to this petition:

28 U.S.C. § 1404(a):

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. § 1407(a):

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this

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3 A73.

section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: Provided, however, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

Federal Rules Of Civil Procedure, Rule 1:

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy and inexpensive determination of every action.

Federal Rules Of Civil Procedure, Rule 33(c):

Where the answer to an

interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.[4]

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4 The last sentence of Rule 33(c) was added as part of the 1980 amendments to the Federal Rules, effective August 1, 1980.

STATEMENT OF THE CASE

These multidistrict antitrust cases were filed by Petitioners in their respective home districts in early 1978, and were subsequently transferred to the Eastern District of Pennsylvania under 28 U.S.C. § 1407 for coordinated pretrial proceedings with other state and private cases.[5] Jurisdiction of the district courts was invoked under 28 U.S.C. § 1337 and 15 U.S.C. § 15.

The cases alleged a price fixing conspiracy among manufacturers of printing and writing paper ("fine paper"), referred to as mills, and certain distributors, referred to as merchants. One group of plaintiffs, comprised of private plaintiffs and nine states, alleged a conspiracy among

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5 In re Fine Paper Antitrust Litigation, 446 F.Supp. 759 (JPML 1978).

defendant mills[6] and certain merchants which were subsidiaries or divisions of defendant mills.[7] The plaintiffs within this group were referred to below as the Class Plaintiffs or the Certified Plaintiffs.[8] The other group of plaintiffs, including Petitioners herein, alleged a conspiracy among the same mills and mill-affiliated merchants, and, in addition, certain independent merchants.[9]

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6 Respondents herein, and Potlatch Corporation, St. Regis Paper Company, Union Camp Corp., Wausau Paper Mills Company, and Westvaco Corp.

7 Butler Paper Company (Great Northern Nekoosa); J.C. Paper Company (Wausau); Seaboard Paper Company (Mead); Nationwide Paper Company (Champion International); Zellerbach Paper Company (Crown Zellerbach); and Western Paper Company (Hammermill).

8 The nine states included in the group of Certified Plaintiffs were generally referred to below as the Minority States.

9 Blake, Moffitt & Towne; Carpenter/Offutt Paper Company; Dixon Paper Company; Graham Paper Company; Noland Paper Company; and Ingram Paper Company.

The plaintiffs in this group were referred to below as the Majority States. The various defendants were referred to, respectively, as the Mill Defendants, the Merchant Defendants, and the Independent Merchant Defendants.

Petitioners' cases were the only Fine Paper cases that did not fully settle prior to trial.[10] At the conclusion of pretrial proceedings, Petitioners' cases were transferred to the Eastern District of Pennsylvania under 28 U.S.C. § 1404(a) and consolidated for trial. Trial commenced on October 9, 1980, and the jury returned a verdict in favor of respondents on December 2, 1980.

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10 Prior to the commencement of trial, Petitioners entered into settlement agreements with the Independent Merchant Defendants. Shortly after the commencement of trial, Petitioners settled with the mill defendants other than Respondents herein.

A. The Scheduling Of Discovery And Trial

Discovery on the merits was stayed during the class certification proceedings, i.e., until February 16, 1979.[11] During a pretrial conference on March 7, 1979, called for the purpose of setting guidelines for discovery,[12] The district court set an initial trial date of January 2, 1980. That setting was not based on any knowledgeable or specific projections of the amount and nature of discovery necessary, or the period within which that discovery could reasonably be accomplished.[13]

The January 2 setting was adhered to six and a half months later during a conference on September 27, 1979, when informed projections of the time needed

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11 Court of Appeals Appendix pp. (hereinafter "C/A App. pp.") 37-38 and 863-866.

12 C/A App. p. 872-1.

13 C/A App. pp. 872-886.

for discovery were available in light of the five and a half months of discovery (primarily the request, production and review of documents) which had been conducted as of that date. Plaintiffs' counsel informed the court at that time of the need to extend the trial date, due to the number of depositions plaintiffs anticipated having to take.[14] The district court adhered to the original trial setting, expressing concern over being a "roundheel" on the trial date.[15]

Two months later, on December 4, 1979, the Certified Plaintiffs stated that they would need until "the fall" to complete depositions and prepare for trial. The district court gave the Certified Plaintiffs a September trial date. At the same time, however, the court expressed its intention to

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14 C/A App. pp. 919-928.
15 C/A App. pp. 1031-1--1031-2.

"separate out" the independent merchant portion of Petitioners' cases for a separate trial in April.[16] In a follow-up conference two weeks later, on December 20, 1979, the court set September 22, 1980 as the specific date of the Certified Plaintiffs' trial, and established July 3, 1980 as the discovery cutoff date.[17]

Three and a half weeks later, on January 15, 1980, the district court set an earlier discovery cutoff date of May 30, scheduled trial of Petitioners' cases for June 16, i.e., two weeks after the close of discovery, and required the filing of Petitioners' pretrial

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16 C/A App. pp. 1107-1116; 1142-1147; 1164-1169; 1266-1267; 1284; 1480. Petitioners later prevailed upon the court to abandon the notion of "separating out" the independent merchant involvement in the conspiracy for a separate trial. C/A App. pp. 1262-1290.

17 C/A App. pp. 1140-1141; 1172; 1179-1180; 1187.

memorandum on June 6, i.e., one week after the close of discovery.[18] That schedule was established over Petitioners' strenuous objection that any discovery cutoff date prior to July would severely prejudice their ability to efficiently and effectively complete a meaningful discovery program and prepare their cases for trial. In so objecting, Petitioners' detailed their discovery efforts since the lifting of the stay on merits discovery,[19] i.e., that 750,000 documents had been reviewed within the preceding six months; that an additional 300,000 documents had yet to be reviewed; that the production of documents by certain defendants had not yet even been completed; and that, conservatively speaking, in excess of 100 depositions

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18 C/A App. pp. 1233-1236.

19 C/A App. pp. 1233-1236; 1262-1290; 1566-1568; 1572-1574; 1576-1580; 1597-1606.

appeared necessary.[20]

Petitioners moved for reconsideration of the scheduling orders,[21] and in doing so, presented the district court with affidavits of counsel which set forth in great detail and with unusual candor Petitioners' successive efforts to adhere to the court's schedule for discovery and trial preparation, the amount and nature of discovery accomplished and remaining, and the need for additional time within which to complete the discovery in an orderly, efficient and meaningful way and prepare for trial.[22] The details provided included the fact that in excess of 1.5 million documents had been produced by

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20 In fact, over 270 depositions were taken within the five months available under the district court's schedule.

21 C/A App. pp. 1493-1499; 1291-1476; and 1477-1492.

22 C/A App. pp. 1299-1310; 1480-1485; and 1524.

defendants (over 400,000 of which had been produced during the preceding three month period); that over 900,000 of those documents had been reviewed to date; that reasonable projections (the basis for which were set forth in detail) indicated the need for 168 depositions, involving a total of 252 days of deposition testimony, and requiring three months to 11.5 months to complete, depending upon the number of depositions taken simultaneously;[23] and the fact that additional time would be needed after the close of discovery for the review, analysis and assimilation of discovery information, the development of damage analyses and damage studies, proper consideration of the place, nature and scope of trial, the preparation of

23 The effort to complete depositions within the time allowed resulted in as many as fifteen depositions being taken simultaneously on a single day.

pretrial memoranda, and attendance to myriad trial preparation matters to assure efficiency at trial, such as the designation of testimony and the resolution of disputes regarding admissibility of evidence.[24] The motion was denied.[25]

One week after the close of discovery, Petitioners submitted their pretrial memorandum,[26] as required, although less than half of the deposition transcripts had been received from the district court's reporter,[27] who had reported the depositions on an expedited basis. The following week, Petitioners'

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24 See, Manual For Complex Litigation, 1977 Edition.) § § 4.20, 4.21, 4.211, 4.22, 4.221.

25 C/A App. p. 1524.

26 The memorandum was 200 pages in length and contained, inter alia, 63 separate contention paragraphs, each of which was annotated to deposition testimony and exhibits supporting the contention.

27 C/A App. pp. 2046-2047; 2061-1063.

trial staff moved to Philadelphia and established a functioning trial office, anticipating having to commence with trial, as scheduled, on June 16. The trial did not commence on that date.[28] With reference only to Petitioners' "unacceptable" trial memorandum,[29] rather than the unavailability of half of the deposition transcripts, the district court cancelled the trial date, required Petitioners to submit a second pretrial memorandum by July 25, and tentatively scheduled Petitioners' cases for trial "with or after" the trial of the

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28 Curiously, Petitioners were the only parties who readied themselves to proceed with trial on that date. Notwithstanding Petitioners' repeated efforts over the prceding six months to obtain extensions of the schedule, the district court adhered to the June 16 trial date. In this context, it is singularly worth noting that defendants' counsel appeared at the "final" pretrial conference with overnight bags in hand. C/A App. pp. 4987-4989.

29 C/A App. pp. 2035-2067.

Certified Plaintiffs in September.[30]

Petitioners second pretrial memorandum was filed on July 25.[31] Because evidence was still unavailable at that time,[32] petitioners informed the court that the memorandum, already 1200 pages in length, would be supplemented when the additional evidence became available. In response, the district court immediately granted Respondents' request for leave to defer the filing of their pretrial memoranda,[33] with the result that Petitioners did not receive

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30 C/A App. pp. 2092-2093.

31 C/A App. pp. 2203-3447.

32 Notwithstanding the district court's representation during the June 16 conference that his reporter would have all deposition transcripts completed by June 25, one month before the brief was due, Petitioners had not received transcripts or exhibits for 16 depositions by July 25, and had not received transcripts and/or exhibits for 39 other depositions in time to be included in their memorandum. C/A App. pp. 4977-4979.

33 C/A App. pp. 4980-4981; 4984-4986.

those memoranda until the night before trial.

On July 30, the district court informed Petitioners by letter that their cases would not be consolidated with the cases of the Certified Plaintiffs for trial on September 22, and that a trial date for their cases would "be determined at a later date."[34]

It was. On September 25, 1980, immediately upon settlement of the Certified Plaintiffs' cases, the district court scheduled, on four days notice, a pretrial conference for September 29, and trial on October 6. [35] During the September 29 conference, Petitioners requested an additional two weeks before trial in light of the logistical difficulties presented by such short notice, such as arranging for living

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34 C/A App. pp. 4985-4986.
35 C/A App. pp. 3885-3897; 3965.

accommodations and a functioning trial office, packing, shipping and unpacking files and records, and rescheduling other litigation commitments.[36] Petitioners also emphasized the numerous advantages of attending to the myriad pretrial matters that would facilitate an orderly presentation at trial, such as designations of testimony, evidentiary objections and rulings, etc.,[37] all of which Petitioners were precluded from previously attending to inasmuch as Respondents and the Certified Plaintiffs were preparing for their trial on September 22.

Following a final pretrial conference on October 6, 1980, and jury selection on October 7 and 8, trial commenced on October 9, 1980. After

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36 C/A App. pp. 3885-3908; 3968-3972.

37 C/A App. pp. 3885-3886; 3905; 3968-3972.

several days of deliberation, the jury returned a verdict in favor of Respondents on December 2, 1980.

B. The Transfer Of Petitioners' Cases To The Eastern District of Pennsylvania For Trial

In January, 1980, the district court ordered all parties who opposed venue in the Eastern District of Pennsylvania for purposes of trial to file objections to such venue.[38] Petitioners objected[39] on the grounds that the Eastern District of Pennsylvania was not a forum in which their cases could have been brought, inasmuch as venue in that district would not have been proper with respect to the Independent Merchants named in their cases.[40] Respondents conceded the

38 C/A App. pp. 1234-1236; 1566-1610.

39 C/A App. pp. 1240-1257; 1506-1508; 1509-1523; 1537-1542; 1551-1565.

40 Blake, Moffitt & Towne, named as a

impropriety of venue in that district as to those defendants.[41]

Moreover, Merchant Defendant Butler Paper Company (an affiliate of Great Northern Nekoosa) objected to venue in the Eastern District of Pennsylvania.[42]

Notwithstanding these objections, and without findings thereon, the district court transferred Petitioners' cases to the Eastern District of Pennsylvania under 28 U.S.C. § 1404(a) upon the completion of coordinated pretrial proceedings, and consolidated the cases for trial under Rule 42(a),

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defendant by Alaska, California, Oregon and Washington (C/A App. pp. 324-334; 364-376; 268-279; 335-348); Carpenter/Offutt Paper Company, named as a defendant by California, Oregon and Washington; Dixon Paper Company, named as a defendant by Colorado (C/A App. pp. 191-202); and Noland Paper Company and Ingram Paper Company, named as defendants by California (C/A App. pp. 364-376).

41 C/A App. pp. 1509-1523.

42 C/A App. pp. 1258-1261; 1537-1542.

Federal Rules of Civil Procedure.[43]

C. Exclusion Of Evidence And Partial Directed Virdict Regarding Merchant House Involvement In The Conspiracy

Petitioners alleged with specificity, both in their complaints and in their pretrial memoranda, a single conspiracy operating at both the mill level and the merchant level, and involving as conspirators certain mills, mill-affiliated merchants, and certain independent merchants.[44] It was that conspiracy upon which evidence was

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43 C/A App. pp. 3448-3449. There is no support for the circuit court's statement that the district court "specifically found" that venue as to Butler was proper. A22, n.6. The record reflects simply the fact of transfer.

44 These allegations were set forth in Petitioners' complaints (C/A App. pp. 116, 197, 211, 222, 254, 274, 331, 342-343, and 371) and in their pretrial memorandum (C/A App. pp. 2467, 2484, 2491, 2563, 2511, 2540, 2552, 2563, 2571, 2578, 2582, and 2585).

offered at trial.

That evidence included correspondence between a mill-owned merchant, J.C. Paper Company, and its parent mill, Wausau Paper Mills Company, regarding an agreement between five mill-owned merchants[45] and two independent merchants[46] to eliminate price discounting. The letter[47] stated as follows:[48]

. . .

Dear Folke:

. . .

The market place is trying very hard to go to bracket pricing in the book [i.e., adherence to quantity prices published in price books]. [Independent Merchant Defendant] Blake has gone to it.

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45 Butler Paper Company (Great Northern Nekoosa), J.C. Paper Company (Wausau), Nationwide Paper Company (Champion International), Seaboard Paper Company (Mead) and Zellerbach Paper Company (Crown Zellerbach).

46 Blake, Moffitt & Towne and Carpenter/Offutt.

47 Plaintiffs' Exhibit 560; C/A App. pp. 4966.

48 Explanations and identifications have been included in brackets for the Court's edification.

[Independent Merchant Defendant] Carpenter Offutt has gone to it. [Merchant Defendant] Nationwide has agreed to it. [Merchant Defendant] Butler has agreed to it. [Merchant Defendant] Seaboard has agreed to it. We feel that [Merchant Defendant] Zellerbach will also go along with the bracket pricing.

It looks very, very promising that the market will firm and bracket pricing will prevail. . . .

. . .

Yours truly,

J.C. Paper Company, Inc.
Wilbur P. Clarke

P.S. I just received a phone call from [Merchant Defendant] Zellerbach saying that they made their announcement today on bracket pricing across the board. It really looks promising, Folke.

The evidence offered at trial also included price announcements from each of those defendants establishing that they did in fact go to firm bracket pricing around April of 1973, pursuant to the agreement reflected in Exhibit 560.[49]

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49 Exhibits 303 (Butler, C/A App. p. 4783); 364 (Carpenter/Offutt, C/A App. p. 4460), 365 (Carpenter/Offutt, C/A App. p. 4861), 366 (Butler, C/A App. p.

The evidence also included the virtually identical "mark-up" schedules used by three of those mill-owned merchants and two of those independent merchants to compute retail prices.[50]

Concluding that such evidence did not reveal the involvement of Mill Defendants, mill-affiliated Merchant Defendants and Independent Merchant Defendants in a single conspiracy operating at both the mill and merchant

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4863), 367 (Seaboard, C/A App. p. 4864), 368 (Zellerbach, C/A App. p. 4865), 369 (Nationwide, C/A App. p. 4866), 370 (J.C. Paper, C/A App. p. 4867), 371 (Noland, C/A App. p. 4868), 373 (Zellerbach, C/A App. p. 4871), and 379 (Blake, Moffitt & Towne, C/A App. p. 4885).

50 Exhibits 358, 359, 374, 375, and 376 (Blake Moffit & Towne), C/A App. pp. 4852, 4856, 5872, 4875, and 4879; Exhibits 551 and 552 (Butler Paper Company), C/A App. pp. 4950 and 4959; Exhibit 309 (Carpenter/Offutt), C/A App. p. 4790; Exhibit 137 (Seaboard), C/A App. p. 4707; Exhibits 342, 355, 356, 357 and 549 (Zellerbach Paper Company), C/A App. pp. 4823, 4834, 4837, 4846, and 4949.

levels, the district court partially granted Respondents' motion for a directed verdict by excluding the above evidence from the jury. [51]

D. Exclusion Of Arkansas Purchase Evidence As A Result Of Arkansas' Reliance Upon Rule 33(c) In Responding To Certain Interrogatories

In September, 1979, certain Mill Defendants[52] served interrogatories on Petitioners.[53] Four of the interrogatories directed Petitioners to complete multi-page forms by typing upon the forms detailed transactional (purchase) data with respect to every purchase of fine paper over a nine year period.[54] For each such purchase

51 C/A App. p. 4499.

52 Boise Cascade Corporation, International Paper Company, Potlatch Corporation, St. Regis Paper Company, Union Camp Corporation, and Weyerhaeuser Corporation.

53 C/A App. pp. 1010-1031.

transaction, eight pages of forms, requiring a minimum of 43 separate entries, were required.

Petitioners responded by invoking the option of Rule 33(c), Federal Rules of Civil Procedure, and producing responsive documents containing the information in lieu of providing a narrative answer, which in this context would have meant completing thousands of forms. [55] Petitioners also referred to their previous responses to defendants' earlier discovery requests, pursuant to which the very documents containing the information elicited by the forms interrogatories had been previously specified, produced, and made available to or copied by defendants. [56]

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54 C/A App. pp. 1018; 1022-1029.

55 C/A App. pp. 1038-1050; 1088-1093; 1051-1056; 1068-1073; 1074-1082; 1100-1106; 1094-1099; 1032-1037; 1057-1067; 1083-1087.

56 C/A App. pp. 706-720; 230-235; 387-401; 236-235 and 446-447;

In December, 1979, the propounding defendants moved to compel Petitioners to complete the forms.[57] The district court granted the motion, and required Petitioners to specifically set forth the information requested.[58] Petitioners moved for reconsideration of the order on the grounds that the order nullified the option expressly provided by the rule, precisely for interrogatories such as those in issue, thereby subverting the intent and purpose of the Rule. Exhibits accompanying the motion for reconsideration included affidavits of counsel attesting to the expense and burden imposed by the requirement that Petitioners complete the forms, and stating that the burden of doing so would be no greater for the defendants than for

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124-131 and 590; 259-264; 721-740; 203-204; 280-294; and 451-468.

57 C/A App. pp. 1117-1139; 1192-1222; 1225-1232.

58 C/A App. pp. 1237-1239.

Petitioners.[59] The motion for reconsideration was denied.[60]

Petitioners then initiated mandamus proceedings,[61] during the pendency of which Petitioners stood on their previous Rule 33(c) responses.[62] During that period, respondents moved twice for sanctions, and the court on both

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59 C/A App. pp. 1311-1476. For example, the affidavit filed by Oregon estimated that extraction of the information would require 5,000 hours and cost $22,000.

60 C/A App. p. 1524.

61 Petitioners petitioned the court of appeals for a writ of mandamus and an emergency stay, both of which were denied. (Third Circuit No. 80-1360). Petitioners then petitioned this Court for a writ of mandamus and a stay of the order. (Supreme Court No. 79-1527). This court denied the motion for stay, but requested a response to the petition from defendants, notwithstanding their earlier waiver of the opportunity to file a brief. The petition was subsequently denied on October 6, 1980. Alaska, et al. v. McGlynn, 449 U.S. 815 (1980).

62 California and Nebraska, however, undertook to respond to the interrogatories. C/A App. pp. 1639-1643; 1668-1671; and 1735-1740.

occasions deferred the matter until the introduction of evidence at trial.[63]

As Petitioners were submitting stipulations regarding purchases by Arkansas at trial,[64] the district court inquired whether Arkansas had completed the forms. When informed that Arkansas had not done so, the court excluded its purchase evidence.[65]

E. Denial of Petitioners' Motions For Class Certification

Petitioners moved to maintain each of their actions as a class action on behalf of their respective governmental entities.[66] The district court denied

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63 C/A App. pp. 1543-1550; 1632-1635; 1636-1638; 1647-1656; 1685-1734; and 3879-1884.

64 C/A App. pp. 4550-4551.

65 C/A App. p. 4551. Only Arkansas was precluded from introducing evidence of purchases at trial. The district court applied its ruling to none of the other states, nor, conspicuously, did Respondents request that it do so.

these motions, but at the same time, granted the motions of the other states and the private plaintiffs.[67]

REASONS FOR GRANTING THE WRIT

A. Transfer Of Petitioners' Cases To The Eastern District Of Pennsylvania For Trial Under § 1404(a) Violated This Court's Mandate In Hoffman v. Blaski

The court of appeal's decision[68] directly conflicts with Hoffman v. Blaski, 363 U.S. 335 (1960). This Court therein interpreted § 1404(a), which provides that:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have

66 C/A App. pp. 132-138; 377-378, 381-386; 429-430, 438-445; 580-581, 586-589; 591-592, 597-600.

67 C/A App. pp. 863-866; 897-918.

68 A20-A22.

been brought. (Emphasis added).

Hoffman held that the prerequisite language of § 1404(a) - which restricts the transfer of an action to those districts "where it might have been brought" - relates to the time an action is brought, not to the time of transfer. 363 U.S. at 342-343. The circuit court, however, reversed the mandate of Hoffman, and held that the threshold requirement of § 1404(a) relates to the facts existing at the time transfer is requested, and, as a result, to those parties who then happen to be before the court. in the action. The circuit court decision thus conflicts with Hoffman, with its own previous decision in Shutte v. Armco Steel Corporation, 431 F.2d 22 (3rd Cir. 1970), and with numerous district court decisions routinely construing the prerequisite language of §

1404(a) in light of Hoffman, and holding that the limiting language of that section relates to the time an action is orginally brought, and to the situation existing at that time.[69]

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69 Intern. Patent Development v. Wyomont Partners, 489 F.Supp. 226 (D. Nev. 1980); American Standard, Inc. v. Bendix Corp., 437 F.Supp. 254 (W.D. Mo. 1980); Schreiber v. Allis-Chalmers Corp., 448 F.Supp. 1079 (D. Kan. 1978); Parker-Hannifin Corp. v. Samuel Moore & Co., 436 F.Supp. 498 (N.D. Ohio 1977); Umbriac v. American Snacks, Inc., 388 F.Supp. 265 (E.D. Pa. 1975); Siemens Aktiengesellschaft v. Sonotone Corporation, 370 F.Supp. 970 (N.D. Ill. 1973); Polin v. Conductron Corporation, 340 F.Supp. 602 (E.D. Pa. 1972); Brotherhood of Locomotive Fire. & Eng. v. Reading Company, 279 F.Supp. 948 (E.D. Pa. 1968); Silver v. Goodman, 234 F.Supp. 415 (D. Conn. 1964); Pan American Bank of Miami v. Gully, 220 F.Supp. 405 (W.D. Pa. 1963). But, c.f., Hess Oil Virgin Islands Corp. v. UOP, Inc., 447 F.Supp. 381 (N.D. Okla. 1978), the only decision cited by the circuit court in support of its holding. Hess, however, merely "assumed" that the threshold requirement of § 1404(a) had been met for the purpose of balancing the respective interests of the parties

The fact that Petitioners had entered into settlement agreements with the Independent Merchant Defendants at the time of transfer was irrelevant to the proper application of § 1404(a). The requirements of § 1404(a) are "unambiguous, direct [and] clear," and the "unequivocal words" of that section, and the legislative history thereto, "establish that Congress indeed meant what it said." 363 U.S. at 343. The requirements are not vague principles to be given liberal construction and application. Olberding v. Illinois Central R. Co., 346 U.S. 338, 340 (1953); De La Fuente v. ICC, 451 F.Supp. 867 (N.D. Ill. 1978).[70] The

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and ruling on the motion for transfer, which was ultimately denied. Thus, Hess stands, at best, as uncertain authority for the circuit court's marked departure from the mandate of Hoffman.

70 For examples of the strict application of the prerequisite language of § 1404(a) in light of

prerequisite language does not mean "where it might have been brought now," i.e., at the time of transfer, against those defendants who then happen to be before the court. The court of appeals was not at liberty to focus their attention on the time of transfer, and to disregard the impropriety of venue in the Eastern District of Pennsylvania as to the Independent Merchants simply because those defendants had tentatively settled[71] with Petitioners at that time.[72]

Hoffman, see, e.g., Brotherhood of Locomotive Firemen; and Hughes v. S.S. Santa Irene, 209 F.Supp. 440 (S.D.N.Y. 1962). The prerequisite language of § 1404(a) relates to the time an action is brought, not to the time of transfer. Hoffman directs a court's attention to the situation existing at that time, including all of the parties-defendant who were then before the court.[[See Ackert v. Ausman, 198 F.Supp. 538, 542 (S.D.N.Y. 1961).

71 C/A App. pp. 7137-7138.

72 The court of appeals affirmed (A22) the district court's order regarding

The Hoffman mandate simply reflects what a proper application of § 1404(a) requires - constancy and finality, resulting from reference to a specific and unalterable situation existing at a single point in time. The court of appeals' decision, on the other hand, permits the prerequisite language of § 1404(a) to be applied with reference to various situations existing at various times throughout the course of litigation. By thus imbuing the prerequisite language with chameleon-like characteristics, the decision transforms venue under § 1404(a) into a moving target, subject to the uncertainties of

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venue as to Butler Paper Company on the basis of a Weyerhaeuser affidavit presented to demonstrate that Butler transacted business in the Eastern District. The court of appeals, however, ignored entirely the responsive affidavit from Butler, which established that Butler transacted no business whatsoever in the Eastern District. C/A App. pp. 1537-1542.

dismissals, settlements and interlocutory judgments which frequently and inevitably change the number and identity of defendants, particularly in the context of multi-party antitrust, securities and derivative actions. Moreover, to subject a plaintiff's venue rights to such shifting standards will have a profound chilling effect upon settlements, which in other respects are judicially encouraged as a matter of public policy. Plaintiffs will be singularly disinclined to settle with defendants if, in doing so, they will jeopardize their choice of forum, and subject their case to the uncertainties of new venue considerations.

The fact that these cases had previously been transferred to the Eastern District of Pennsylvania for coordinated pretrial proceedings under 28 U.S.C. § 1407 in no way qualifies the

prerequisite language of § 1404(a) or the mandate of Hoffman.[73] Under § 1407, actions are transferred to a single district for pretrial proceedings only,[74] at the conclusion of which the actions "shall" be remanded to the districts in which they were filed,[75] unless properly transferred under § 1404(a).[76] Transfers under § 1404(a) by a transferee court, however, are proper only to the extent that the threshold requirements of that section have been met.[77] If the

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73 See, e.g., In re Nissan Motor Corp. Antitrust Litigation, 471 F.Supp. 754, 759 (S.D. Fla. 1979); In re Oil Spill by "Amoco Cadiz" Off Coast of France, 491 F.Supp. 161, 166 (N.D. Ill. 1979).

74 See, e.g., In re Dept. of Energy Stripper Well Exemption, 472 F.Supp. 1282, 1286 (JPML 1979).

75 See, e.g., In re Air Crash Disaster Near Chicago, Etc., 476 F.Supp. 445 (JPML 1979).

76 See Air Disaster at John F. Kennedy, 479 F.Supp. 1118, 1121-1122, (E.D.N.Y. 1978).

77 See, Greyhound Computer, 342 F.Supp. at 1145; Antibiotic Antitrust Actions, 333 F.Supp. at 303.

prerequisite language of § 1404(a) precludes transfer under that section, remand under § 1407 is required.[78] The mandatory remand provisions of § 1407 simply reflect due regard for a plaintiff's choice of forum.[79]

As a practical matter, the need for remand of separate actions to their home districts upon the completion of coordinated pretrial proceedings is seldom necessary. Remand is generally obviated by global settlements or other pre-trial terminations, or by proper transfers under § 1404(a) when the prerequisites of that section have been satisfied.[80] However, when the

78 See Career Academy Antitrust Litigation, 57 F.R.D. at 571.

79 See Philadelphia v. Emhart, 317 F.Supp. at 1323; L.C. O'Neil Truck Limited v. Pacific Car & Foundary, 278 F.Supp. 839, 843 (D. Ha. 1967).

80 Air Crash Disaster Near Chicago, 476 F.Supp. at 450; Career Academy Antitrust Litigation, 57 F.R.D. at 571; and Wiegel, The Judicial Panel

prerequisites have not been met, transfers thereunder are not proper, and remand is necessary.

Moreover, the impact of multiple remands upon the respective home districts can be ameliorated, if not eliminated entirely, by proper regard for, and use of, a district court's ability to stay proceedings on its calendar in light of related litigation pending elsewhere,[81] the effect of collateral estoppel upon subsequent trials and settlement,[82] and the ability

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on Multidistrict Litigation, Transferor Courts and Transferee Courts, 79 F.R.D. 575, 583 (1978).

81 See Cessna Aircraft Company v. Brown, 348 F.2d 689 (10th Cir. 1965); Brotherhood of Locomotive Firemen, 279 F.Supp. 948 (E.D. Pa. 1968); Levin, 289 F.Supp. at 359; and Foster Wheeler Corporation v. Aqua-Chem, Inc., 277 F.Supp. 382, 385 (E.D. Pa. 1967).

82 See, Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326-333 (1979); Nissan Motor Corp., 471 F.Supp. 754 (S.D. Fla. 1979); and In re Disposable Diaper Patent

of a transferee judge familiar with the litigation to obtain an inter-circuit transfer for the purpose of presiding at trial in another district.[83] Indeed, in this proceeding, Petitioners presented the district court with an opportunity to avoid remanding their cases to their respective home districts. In response to the district court's transfer of their cases to the Eastern District of Pennsylvania, sua sponte,[84] Petitioners moved in the alternative for the transfer of all cases to the Northern District of California - the State of California's home district.[85] Unlike the transfer to the Eastern District of Pennsylvania,

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Validity Litigation, 362 F.Supp. 567, 568 (JPML 1973).

83 See In re Viatron Computer Systems Corp. Litigation, 86 F.R.D. 431, 432 (D. Mass. 1980); and Air Crash Disaster Near Chicago, 476 F.Supp. at 449-450.

84 C/A App. pp. 1234-1236; 1566-1610.

85 C/A App. pp. 1795-1800; 1801-1811.

transfer to the Northern District of California would have been entirely proper, inasmuch as that district was a district in which each of the cases, as and when filed, "might have been brought."[86]

B. THE SCHEDULING OF DISCOVERY AND TRIAL VIOLATED THE FUNDAMENTAL PRECEPTS OF RULE 1, F. R. CIV. P.

The schedule of discovery and trial preparation imposed upon Petitioners by the district court, and the insensitive and rigid manner in which that schedule was formulated and adhered to, constituted a major departure from the conduct of judicial proceedings contemplated by Rule 1 of the Federal

86 The court of appeal's allusion to concerns for judicial efficiency ignores the availability of the Northern District of California as a proper forum for a single trial, and the fact that the district judge could have presided over a single trial in that district. A22.

Rules of Civil Procedure, which requires the "just, speedy, and inexpensive determination of every action." That schedule, and the circuit court's affirming decision,[87] focused on but one of the constituent elements of the rule - speed. The coordinate requirements of the rule - that proceedings thereunder be "just" - was all but forgotten.

The inordinate emphasis upon speed as an end in itself is reflected by the fact that the district court:

1. Established an initial trial date that allowed only ten months for the completion of discovery and trial preparation in a major multi-party, multidistrict antitrust case, and did so

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87 Apparently based, in large part, on the author's view that "to prove a prima facie case of conspiracy, or some other horizontal or vertical restraint, a few dozen invoices - or perhaps a hundred - would suffice." Aldisert, The Role Of The Courts In Contemporary Society, 38 U. Pitt. L.Rev. 437, 469 (1977).

in a total vacuum, at a time when none of the considerations relevant to the establishment of a trial date - the amount and complexity of discovery required, and the time necessary to efficiently and effectively complete that discovery and prepare for trial - were susceptible to sufficiently informed, specific and realistic projections;

2. Rigidly adhered to that initial schedule, even as discovery progressed, and more detailed and realistic projections became available, and were presented to the court with candor and specificity;

3. Ultimately allowed a period of only 12.5 months within which to review 1.8 million documents and depose 270 people;

4. Scheduled the submission of a detailed pretrial memorandum one week after the close of discovery, and the

commencement of trial one week later;

5. Required Petitioners' trial staff to travel to Philadelphia and establish a functioning trial office for a trial beginning only two weeks after the close of discovery before recognizing the obvious and continuing the trial; and in doing so, attributing the need for such rescheduling to Petitioners' "unacceptable" trial memorandum, rather than to the inevitable unavailability of deposition transcripts resulting from the court's failure to adopt an appropriate schedule for discovery and trial preparation;

6. Upon the filing of Petitioners' 1200 page second pretrial memorandum, immediately granted, without notice and hearing, Respondents' request to be relieved from having to file their pretrial memoranda, simply because Petitioners intended to supplement their

memorandum with additional evidence which remained unavailable at the time the memorandum was submitted, with the result that Petitioners did not receive Respondents' trial memoranda until the night before trial;

7. Informed Petitioners on July 30, 1980, that their cases would not be consolidated with the cases of the Certified Plaintiffs for trial on September 22, and that a trial date for Petitioners' cases would be "determined at a later date," and then, immediately upon settlement of the Certified Plaintiffs' cases, scheduled, on 4 days notice, a pretrial conference with Petitioners, and the commencement of trial one week later.

The schedule imposed by the district court was characteristic of Procrustes and Sisyphus, not of the procedures contemplated by Rule 1. The rules do not

require that fair, adequate and orderly discovery and trial preparation be sacrificed to speed as a result of a court's zeal to dispose of pending litigation.[88] "Efficiency is not an end in itself. It has as its objective the very purpose of the whole system - to do justice."[89] In the absence of procrastination, bad planning, lack of diligence or bad faith on counsel's part, all of which were demonstrably absent from this proceeding, it is an abuse of

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88 Winston v. Prudential Lines, 415 F.2d 619, 621 (2nd Cir. 1969); Freehill v. Lewis, 355 F.2d 46, 48 (4th Cir. 1966); and Sutherland Paper Co. v. Grant Paper Box Co., 183 F.2d 926, 931 (3rd Cir. 1950).

89 Burger, Agenda For 2,000 AD - A Need For Systematic Anticipation, 70 F.R.D. 83, 92 (1976) (Keynote address at the National Conference On The Cause Of Popular Dissatisfaction With The Administration Of Justice, St. Paul, Minnesota, April, 1976). See also, Aetna Casualty & Surety Co. v. S/S Green Bay, 307 F.Supp. 72, 74 (E.D. La. 1969).

discretion to deny a fair and adequate opportunity for orderly and effective discovery and trial preparation.[90]

Accomplishment of the objectives of Rule 1 requires weighing the respective elements of the rule and maintaining an even balance. C.f., Landis v. North American Company, 299 U.S. 248, 254-255 (1936). A district court's failure to strike a proper balance between the constituent elements of Rule 1 in a fair, informed and sensitive manner, displaying the requisite degree of flexibility in reevaluating and redetermining discovery and trial preparation schedules as necessary,[91] constitutes an abdication

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90 Gaspar v. Kassm, 493 F.2d 964, 969 (3rd Cir. 1974); Eli Lilly and Company v. Generix, 460 F.2d 1096, 1105 (5th Cir. 1972); Freehill, 355 F.2d at 48; Thermo King Corporation v. White's Trucking Service, 292 F.2d 668, 678 (5th Cir. 1961); Sutherland Paper, 183 F.2d at 931.

91 Freehill, 355 F.2d at 48; Schwarzer, Managing Civil

of its judicial function and a refusal to do that which it is duty bound to do. C.f., LaBuy v. Howes Leather Co., 352 U.S. 249 (1957) (mandamus proceeding). Such a departure from the accepted and usual course of judicial proceedings requires the exercise of this Court's supervisory powers over the federal judiciary, for the purpose of placing the coordinate elements of Rule 1 in true equipose and formulating guidelines for their construction and application to assure that the purposes of the rule are not frustrated. See Herbert v. Lando, 441 U.S. 153, 177 (1979); ACF Industries, Inc. v. E.E.O.C., 439 U.S. 1081 (1979) (Powell, Stewart and Rehnquist, JJ., dissenting from denial of certiorari); Schlagenhauf v. Holder, 379 U.S. 104 (1964).

Litigation: The Trial Judge's Role, Judicature, 402, 408 (April, 1978).

This Court's refusal to review the schedule imposed in this case will allow for a continued emphasis upon speed alone in the conduct of proceedings, as an end in itself, rather than upon the expeditious, yet orderly and effective conduct of discovery and trial preparation. This would have a major negative impact upon the effective enforcement of the antitrust laws, which rely heavily upon private treble-damage actions as a means of enforcement.[92] See, e.g., American Society of Mechanical Engineers v. Hydrolevel Corp., ____ U.S. ____, 102 S.Ct. 1935, 72 L.Ed. 2d 330, 343 (1982). Proper regard for the nature of sophisticated antitrust

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92 State Attorneys General play a major role in this enforcement, as reflected by 15 U.S.C. § 15(c), which authorizes state Attorneys General to sue as parens patriae to recover damages on behalf of citizens injured by violations of the antitrust laws.

conspiracies, the circumstantial evidence from which those conspiracies are inferred, and the time required to gather such evidence from documents and depositions during the course of discovery, and to review, analyze and assimilate that evidence for efficient, effective and meaningful presentation at trial, is essential for truly effective enforcement of the antitrust laws. Failure by the courts to allow antitrust plaintiffs a fair and adequate opportunity to pursue discovery in an expeditious, orderly and effective manner will have a profound chilling effect upon the initiation of such actions, contrary to the very intendment of the antitrust laws.

In the context of scheduling discovery and trial preparation, it is revealing to compare the time interval between the filing and disposition of

Petitioners' cases with the median time interval of antitrust cases in general. The interval between the transfer of these cases to the Eastern District of Pennsylvania under 28 U.S.C. § 1407 on March 3, 1978, and the rendering of the jury verdict in Petitioners' trial on December 2, 1980, was 33 months, or 2.75 years. Merits discovery was stayed for more than a third of that time.[93] While the median time interval between the filing and disposition of antitrust cases terminated during 1980 was 30 months, or 2.5 years, ten percent of those cases had an interval in excess of 64 months, or 5.3 years.[94] Since only eight percent of the cases terminated during 1980

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93 Merits discovery was stayed until the entry of Pretrial Order No. 30 on February 16, 1979. C/A App. pp. 863-866.

94 Annual Report of the Director of the Administrative Office of the United States' Courts (1980), p. 398 (Table C 5A).

terminated "at trial," however,[95] it is entirely reasonable to assume that the eight percent reaching trial comprised most of the group that exceeded 5.3 years in duration. Another comparison is revealing. The Department of Justice and the Federal Trade Commission spent two and a half years and one and a half years, respectively, investigating this case.[96] Petitioners, however, were allowed only 12.5 months within which to complete discovery.

C. The Exclusion Of Evidence And The Partial Directed Verdict Violated This Court's Mandate In Continental Ore

The decisions below disregard this Court's pronouncement in Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696 (1962), that in ruling on

95 Id., p. 389 (Table C 4).
96 C/A App. pp. 1031-3.

Respondents' motion for a directed verdict the district court was required to view the evidence in the light most favorable to Petitioners, and to give Petitioners the benefit of every fair and reasonable inference to be drawn from the evidence. Rigid adherence to that mandate is of particular importance in antitrust cases, "where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962).

The excluded evidence was damning. As previously revealed, Exhibit 560 unequivocally demonstrated communication between a Mill Defendant, five mill-affiliated Merchant Defendants, and two Independent Merchant Defendants to eliminate price discounting and go to "firm bracket pricing." That letter

alone is sufficiently damning. However, in conjunction with the evidence revealing that those defendants did in fact circulate announcements of their firm pricing decision, the inference of conspiratorial conduct is overwhelming. In light of such evidence, the court of appeals's conclusion that submission of this evidence to the jury would have allowed "mere speculation . . . to do duty for probative facts" is astounding.[97]

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97 A27. The court of appeal's decision is remarkable in one other respect. The decision actually found that the excluded evidence was probative of the single conspiracy operating at both levels upon which evidence was presented at trial. The court's affirmance, however, was predicated on its misapprehension of the conspiracy actually alleged and presented by petitioners. A26-A27.

D. The Exclusion Of Arkansas Purchase Evidence Reflects Total Disregard For The Procedural Safeguards Expressly Provided By Rule 33(c), F. R. Civ. P.

The orders below ignore the express provisions of Rule 33(c) of the Federal Rules of Civil Procedure. Petitioners' production of the very purchase documents from which the information elicited by the forms interrogatories could have been derived or ascertained, in lieu of undertaking the burden and expense of themselves extracting the information from the documents and completing the forms, was entirely justified and constituted a sufficient and good faith response to the interrogatories under the rule.[98] It is difficult to imagine a set of interrogatories more suited for a Rule

98 See, Daiflon, Inc. v. Allied Chemical, 534 F.2d 221 (10th Cir. 1976); Technitrol, Inc. v. Digital Equipment Corporation, 62 F.R.D. 91 (N.D. Ill. 1972); and Milsen v. Southland Corp., 16 F.R.Serv. 2d (M.D. Ill. 1972).

33(c) response. Petitioners' uncontroverted affidavits accompanying their motion for reconsideration of the order requiring them to complete the forms, and the various responses themselves, clearly establish that the conditions to invoking the option provided by the rule were satisfied.[99] The information elicited by the forms could be derived or ascertained from the face of the purchase documents produced by Petitioners; the burden of obtaining the information was substantially the same for Respondents as for Petitioners; and the purchase records containing the

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99 Respondents at no time specified any deficiencies in Petitioners' Rule 33(c) responses, or specific data elicited by the forms which was not included in the documents offered and produced under the rule. It was their burden to do so. Daiflon, 534 F.2d at 227. Nor did respondents at any time controvert Petitioners' affidavits setting forth relevant information regarding the propriety of their Rule 33(c) responses.

elicited information were not only specified by category and location, but had been produced and made available to Respondents for inspection and copying, and in fact copied, in response to earlier discovery requests nearly a year and a half prior to the time the forms interrogatories were propounded.[100]

The Advisory Committee notes to the rule state that subdivision (c) relates especially to the very interrogatories involved in this proceeding - those "which require a party to engage in burdensome or expensive research into his own business records in order to give an

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100 The last sentence of current Rule 33(c) was added as part of the 1980 amendments to the rules, and was not effective at the time of Petitioners' responses. Nonetheless, it is evident from the responses, and from the fact that a discrete group of purchase documents had been produced to Respondents, that the requirements established by the last sentence were met as well.

answer." The notes further comment that the subdivision "places the burden of discovery upon its potential benefitee." C.f., Oppenheimer Fund Inc. v. Sanders, 437 U.S. 340, 356-357 (1978).

The circuit court's decision ignores entirely the manifest sufficiency of Petitioners' responses under Rule 33(c), the purpose and underlying policy of the rule, and Respondents failure at any stage of this proceeding to specify the claimed deficiencies in Petitioners' production of documents or the information available therefrom. If Petitioners' responses were insufficient, it is apparent that use of the procedural safeguard offered by Rule 33(c) would never be justified. The circuit court's decision effectively deletes Rule 33(c) from the Federal Rules. For this reason, supervisory review by this court is essential.

E. The Denial Of Class Certification Was Premised Upon A Distortion Of The Commonality Requirement Of Rule 23, F. R. Civ. P.

The district court's denial of class certication for Petitioners hinged on its comparison of the conspiracy alleged by Petitioners with the consiracy alleged by the Certified Plaintiffs.[101] The purpose of Rule 23, Federal Rules of Civil Procedure, however, is to judge each class on its own merits, not to compare one class with another. Regardless of what perceived differences existed between the conspiracy allegations of the respective plaintiffs, the fact remains that proper application of Rule 23 requires a comparison only of the claims asserted by the plaintiff-class representative and the claims asserted on behalf of the members of the class it

101 C/A App. p. 916.

purports to represent. Specifically, in considering whether common questions of law or fact exist for purposes of certification, the only comparison required by Rule 23 is a comparison of the questions of law or fact to be relied upon by a plaintiff with the questions of law or fact which would be relied upon by the class members. Class certification decisions turn on whether questions of fact are common between the class representative and the class it seeks to represent; not whether the questions of fact are common between two separate classes.[102]

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102 The district court's comparison of one class with another reflects its efforts as a transferee judge under § 1407 to transform all coordinated cases into a homogenous group. Cases transferred under § 1407, however, are not fungible commodities, and any efforts to treat them as such, or force them to become such, distort the very purpose of § 1407.

CONCLUSION

For the foregoing reasons, Petitioners respectfully submit that the Petition For Writ Of Certiorari should be granted.

DATED: November 9, 1982.

Respectfully submitted,

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